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In The

SUPREME COURT OF THE UNITED STATES

No. _____

October Term, 1975

James L. Buckley, et al.,

Appellants,

—v.—

Francis R. Valeo, Secretary
of the United States Senate, et al.,

Appellees.

BRIEF OF LOS ANGELES COUNTY CENTRAL COMMITTEE OF THE PEACE AND FREEDOM PARTY, AMICUS CURIAE

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BRIEF OF LOS ANGELES COUNTY CENTRAL COMMITTEE OF THE PEACE AND FREEDOM PARTY, AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE[1]

The California Peace and Freedom Party is one of four political parties qualified for ballot status in California.

The Los Angeles County Central Committee of the Peace and Freedom Party is the body officially

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[1] Letters of consent to the filing of this brief have been filed with the Clerk of the Court.

authorized to conduct the party's campaign in Los Angeles County under California Election Code Section 8940. As of September 12, 1975, 5,883 voters were registered as affiliated with the Peace and Freedom Party in that county, an increase from 4,071 in January 1975.

Both the Los Angeles County Central Committee and the State Central Committee of the California Peace and Freedom Party are affiliated nationally with the People's Party, whose 1972 presidential candidate, Dr. Benjamin Spock, appeared on the ballots of 10 states, including California, and was one of the four presidential candidates assigned Secret Service protection during the general election campaign. The People's Party expects to increase the number of states in which it is on the ballot in 1976 and the California Peace and Freedom Party will hold a presidential primary election on June 8, 1976.

The Peace and Freedom Party has a disproportionately high number of poor members and in 1974, 34 of its 44 candidates for partisan state and federal office filed under Court order after the Federal District Court in the Northern District of California certified their inability to pay the candidate filing fees required at that time. Being classified as a "new party" by the Federal Election Campaign Acts of 1971 and 1974, its nominee for president would be denied advance public funding in the general election, regardless of her or his potential support at that time.

In early 1973, the Los Angeles County Peace and Freedom Party Central Comittee sent a mailing to all of its members, urging them to utilize the $1.00 check-off established by 26 U.S.C. 6096, designating their $1.00 for the sole use of the nominee of the "California Peace and Freedom Party." All such dollars designated by its members solely for the use

of the Peace and Freedom Party nominee were subsequently appropriated by the Congress by P.L. 93-53 for the use of other parties.

The Peace and Freedom Party has been in the forefront of efforts to open up the political process to more effective participation by the poor and by dissenting political minorities. Its efforts in this area include numerous lawsuits in both the state and federal court systems, including Lubin v. Panish, 415 U.S. 709 (1974), sponsored by the Southern California ACLU Foundation at the request of the Peace and Freedom Party. Donald Paul Lubin was a member of the Los Angeles County Central Committee of the Peace and Freedom Party.

SUMMARY OF ARGUMENT

This brief focuses on the First and Fifth Amendment challenges to the federal system for public financing of presidential elections contained in certified questions 5 and 6 before the Court of Appeals. The judgment of the Court of Appeals on these two questions should be reversed.

Extensive attention is devoted to the constitutional infirmities of the matching system for funding primary elections. This system confers a discriminatory advantage on candidates with wealthier supporters, thereby discriminating against other candidates and their supporters in violation of the First Amendment and the Due Process Clause of the Fifth Amendment. It is noted that the state asserts no compelling interest that candidates with wealthier supporters be given more public funds than candidates with poor supporters. Furthermore, indigent voters are absolutely excluded from effective participation in this integral new portion of the electoral process solely because of their inability to make a monetary contribution.

The eligibility criteria chosen for public funding in both the primary and general elections are remarkably ill-fitted to the asserted state interest of limiting public funding to "serious" candidates. The primary election criteria is based on wealth, a "traditionally disfavored" and "suspect" classification, and violates the "constitutionally protected right to participate in elections on an equal basis with other citizens." The general election funding criteria fails to accommodate the fluidity of American politics, excluding serious new party candidates from any advance public funding, regardless of their strength, thereby infringing on the associational rights of their supporters. Under the Federal Election Campaign Act criteria, Theodore Roosevelt, identified by the Court of Appeals opinion as an early advocate of public campaign financing, would have been denied advance public funding in his 1912 general election campaign as a new party candidate, despite the fact he ran second in both the popular and electoral vote.

Both the primary and general election public funding systems infringe on basic constitutional rights and must be subject to "close judicial scrutiny" and the "less drastic means" test. Since other "obvious and well-known means of testing the 'seriousness' of a candidacy" are available--such as a petition requirement--these more "drastic means" fail to meet constitutional standards.

The Court is further reminded that there is a vital public interest--a state interest--in maintaining a diversity of political views within the electoral system and that "right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authorative selection."

The $1.00 check-offs designated for specified party nominees in early 1973 were misappropriated for the use of other candidates by P.L. 93-53.

ARGUMENT

I.

THE FEDERAL ELECTION CAMPAIGN ACT OF 1974, BY PROVIDING PRIMARY ELECTION PUBLIC FUNDING BASED SOLELY UPON THE MATCHING OF PRIVATE CONTRIBUTIONS, DISCRIMINATES AGAINST CANDIDATES SUPPORTED BY POOR VOTERS AND AGAINST THE VOTERS SUPPORTING SUCH CANDIDATES, IN VIOLATION OF THE FIRST AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

A. The Matching System Confers an Advantage on Candidates With Wealthier Supporters in Violation of the Due Process Clause of the Fifth Amendment.

Chapter 96 of Subtitle H of the Internal Revenue Code of 1954 is known as the Presidential Primary Matching Payment Account Act, hereinafter cited as the Primary Matching Payment Act. 26 U.S.C. 9031-9042. For every qualified dollar raised in private contributions, the Account will give the candidate one dollar in public funds. The Act provides matching funds only for the first $250 contributed to a candidate by every individual donor. 26 U.S.C. 9034(a). However, to be eligible for any matching payments, a candidate must raise at least $100,000 in such qualified matchable contributions, with at least $5,000 required to be raised in each of at least 20 states.

This system cannot be sustained just because it is "workable," as asserted by the Court of Appeals in the opinion below at page 1566 (West's advance sheets). The question is whether or not the system is constitutional.

Any public campaign financing system basing public payments on the matching of private contributions confers a distinct advantage on the candidate with wealthier supporters. The candidate whose supporters can contribute $250 each will receive 250 times as many public dollars as the candidate with the same number of supporters who are financially able to contribute an average of only $1.00 each. With their public funds, then, the candidate with the wealthier supporters can purchase 250 times as many radio advertisements, television spots, handbills, posters, billboards, newspaper advertisements or mass mailings as the candidate with the poorer supporters. The advantage conferred on the candidate with the wealthier supporters is neither small nor subtle, it is immense and blatant.

The State asserts no compelling interest that candidates with wealthy supporters be given more public funds than candidates with poor supporters. The State does assert an interest in limiting payments to "serious" candidates. But, as a matter of law, one can no more say that a candidate lacks "seriousness" solely because that candidate's supporters are of limited financial means than one can say that a candidate lacks "seriousness" solely because she or he is personally unable to pay a monetary filing fee. Lubin v. Panish, 415 U.S. 709, 716-717 (1974), Bullock v. Carter, 405 U.S. 134, 145-146 (1972), Georgia Socialist Workers Party v. Fortson, 315 F.Supp. 1035, 1041 (N.D. Ga. 1970), affirmed on other grounds as Jenness v. Fortson, 403 U.S. 431 (1971). Classifications based on wealth are inherently "suspect" and "traditionally disfavored," McDonald v. Board of

Election Commissioners, 394 U.S. 802, 807 (1969), Harper v. Virginia Board of Elections, 383 U.S. 663, 668 (1966), Douglas v. California, 372 U.S. 353 (1963).

The granting, by state action, of such an immense advantage to candidates with wealthier supporters invidiously discriminates against candidates with poor supporters in violation of the Due Process Clause of the Fifth Amendment. As stated by this Court in Johnson v. Robison, 415 U.S. 361 (1974) at pages 364-365, note 4:

> "Although 'the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is "so unjustifiable as to be violative of due process."' Schneider v. Rusk, 377 U.S. 163, 168 (1964); see Frontiero v. Richardson, 411 U.S. 677, 680 n.5 (1973); Shapiro v. Thompson, 394 U.S. 618, 641-641 (1969); Bolling v. Sharpe, 347 U.S. 497 (1954). Thus, if a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment. See Richardson v. Belcher, 404 U.S. 78, 81 (1971)." (1974).

Furthermore, since the matching system imposes "a very 'real and appreciable impact' on the equality, fairness and integrity of the electoral process," it must be subject to strict judicial scrutiny. Gould v. Grubb, 14 C.3d 661, 670 (July 7, 1975). Also, see Bullock v. Carter, supra, p. 134. Under such a standard of judgment, the matching system must surely fail.

B. The Conferring of a Discriminatory Advantage on Candidates With Wealthier Supporters Discriminates Against Voters Supporting Other Candidates, Effectively Diluting the Weight of Their Votes in Violation of the Due Process Clause of the Fifth Amendment and Abridging Their Right of Association Guaranteed by the First Amendment.

The rights of candidates and voters are closely intermingled. As this Court stated in Lubin v. Panish, supra, 415 U.S. 709 (1974), at page 716:

> "... voters can assert their preferences only through candidates or parties or both, and it is this broad interest that must be weighed in the balance."

The matching system, by placing candidates with poor supporters in a disadvantaged position, abridges those candidates' supporters' rights to associate effectively for the advancement of their own political beliefs. See Bullock v. Carter, 405 U.S. 134, 143 (1972), and Williams v. Rhodes, 393 U.S. 23, 31 (1968).

Furthermore, this Court has continually widened the scope of the voter's right to equal protection in the electoral process over the past fifteen years. At first, this was expressed in the requirement that each voter have an equal vote. Baker v. Carr, 369 U.S. 186 (1962), Grey v. Sanders, 372 U.S. 368 (1963), Wesberry v. Sanders, 376 U.S. 1 (1964). Then, the Court broadened its language in Reynolds v. Sims, 377 U.S. 533 to declare at page 565 that:

> "... Full and effective participation by all citizens in ... government requires ... that each citizen have an equally effective voice in the election. ..." (Emphasis added.)

Finally, in Dunn v. Blumstein, 405 U.S. 330 (1972) this Court stated its position at page 336:

> "... In decision after decision, this Court has made it clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."

Under the Primary Matching Payment Act, a poor citizen obviously has a much less effective voice than a wealthy citizen in assisting the candidate the poor citizen supports to qualify for public funding and to receive the full amount of such funding. The poor citizen may still participate in the election, but she or he certainly does not do so on an "equal basis" with the wealthy citizen under the matching system.

The California Supreme Court carried the United States Supreme Court's various decisions to their logical conclusion in its unanimous decision in Gould v. Grubb, 14 C.3d 661 (July 7, 1975), holding at page 670:

> "... a statute, ordinance or election practice which reserves such an advantage for a particular class of candidates inevitably dilutes the weight of the vote of all those electors who cast their ballots for a candidate who is not included within the favored class."

The Primary Matching Payments Act "reserves such

an advantage" for the class of candidates supported by wealthy contributors, thereby inevitably diluting the weight of the vote of all those electors who cast their ballots for other candidates. Such a dilution violates the equal protection guarantees inherent in the Due Process Clause of the Fifth Amendment. The constitutional guarantee of equal protection, as stated unequivocally in Harper v. Virginia Board of Elections, supra, 383 U.S. 663 (1966), at page 668, is:

> "... the principle that denies the State the right to dilute a citizen's vote on account of his economic status ... ."

C. The Primary Matching Payment Act is Exclusionary as to Indigent Voters.

The Primary Matching Payment Act bases the amount of public payments to a candidate, as well as a candidate's eligibility to receive any public payments at all, on the receipt of monetary contributions. Volunteer services are not counted, nor is there any alternative eligibility criteria such as the submission of petition signatures. Hence, the Primary Matching Payment Act is absolutely exclusionary as to indigent voters who are unable to make a monetary contribution. This denies these citizens their "constitutionally protected right to participate in elections on an equal basis with other citizens." Dunn v. Blumstein, supra, 405 U.S. 330, 366 (1972).

The number of poor and indigent persons is not insignificant. The Los Angeles Times on August 31, 1975, on page 11, reported that the number of Americans enrolled in the government's food stamp program declined slightly to 19.1 million in July, according to the Department of Agriculture. Robert Samuelson, writing on page 5 of the Los

Angeles Times Opinion Section on August 31, 1975, noted that one of the principal eligibility criteria for receiving food stamps is that the applying family have less than $1,500 in assets--$3,000 for the elderly over 65--with some necessities exempted from being included in the total. Senator George McGovern's article on the same page, states that 77% of food stamp recipients have incomes after taxes below $5,000 per year. Real wages continue to decline as inflation consumes paychecks and pensions. The September 6, 1975 Los Angeles Times, on page 1, reported that the number of jobless in California in August 1975 stood at 898,400, 10.2% of the total labor force on a seasonally adjusted basis, according to the State Employment Director. In May 1975, California's unemployment rate peaked at 10.6%, the highest figure since the state began keeping jobless records 25 years earlier. Nationally, the employment situation has followed a similar pattern.

The poor, the indigent, and the unemployed can be found in all mass political parties, whether Democratic, Republican, American Independent, Peace and Freedom, Libertarian or independent. They may not be easy to see. Many are disheartened and have ceased to participate. As noted by the New York Times editorial of December 4, 1972:

> "There is a direct correlation between income and political participation. The poor do not vote in large numbers. ... They cannot believe that if they vote, it will make any difference in their lives or in the nation's course."

Previouly, governmental bodies had sought to encourage the poor to participate, emphasizing that the state, in every official respect, would weight their participation equally with that of the wealthiest citizen in all phases of the electoral process. Now,

with the matching system, the poor see Congress reversing this direction and moving officially to demean their participation in the political process because of their poverty.

This Court has been vigilent in defending the constitutional rights of poor citizens to participate fully in the political process. It has moved relentlessly over the past decades to strike down state-imposed wealth-related barriers to equal citizen participation in the electoral process. Harper v. Virginia Board of Elections, supra, 383 U.S. 663 (1966), Bullock v. Carter, supra, 405 U.S. 134 (1972), and Lubin v. Panish, supra, 415 U.S. 709 (1974). This Court must not fail to strike down new state-imposed wealth-related barrier to equal participation and, in doing so, it should reaffirm its previous positions enunciated in Harper v. Virginia Board of Elections, supra, 383 U.S. at 666, that:

> "... a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. ..."

and again at 383 U.S. 668 that:

> "... Wealth, like race, creed, color, is not germane to one's ability to participate intelligently in the political process. ..."

D. Denial of Equally Effective Participation in the Primary Election Constitutes Denial of Equally Effective Participation in the Entire Electoral Process.

As noted by the staff of the Harvard Law

Review in that journal's comprehensive article "Developments in the Law--Elections," 88 HLR 1111 (April 1975), at Page 1151:

> "The selection of nominees by political parties plays a crucial role in the electoral system. Indeed the nomination of candidates by the major parties has been called the 'most critical stage' of the electoral process. Although independent and minor party candidates play an important role in the political process, they rarely win elections; thus '[a]s a practical matter, the ultimate choice of the voters is predetermined when the [major party] nominations have been made.' Especially in the case of major party nominating procedures, therefore, the ability of individuals to participate fully in party processes is of paramount importance if they are to have a meaningful voice in the selection of their elected officials."

Denial to the poor of effective participation in the primary election cannot be remedied by giving them an equal voice again in the general election after nominations have already been made. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U. S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

The Court of Appeals in its opinion below in the instant case, upheld both the matching system and the entire public funding provisions of Subtitle H of the Internal Revenue Code as furthering the State's interest in "reducing the reliance of Presidential candidates on large contributors, thus reducing their influence on the outcome of elections and on

the operation of government." West's advance sheets, pp. 1507, 1561. But the basing of public funding in the primary election on a matching system is certainly destructive of such a stated goal. In the words of one legal scholar, Joel L. Fleischman, in his article on "Public Financing of Election Campaigns: Constitutional Constraints on Steps Toward Equality of Political Influence of Citizens," 52 N.C.L. Rev. 349, (Dec. 1973), at page 390:

> "... establishing eligibility by requiring prospective primary candidates to raise from private sources a fixed amount of money as evidence of voter support leaves wealthier citizens in the position of determining who will and will not receive public campaign funds. If the ceilings of individual contributions were sufficiently low--ten to twenty dollars--it is conceivable that such a mechanism might be held constitutional. Higher contribution ceilings, however, would permit the wealthy to control the field of primary candidates and then to enjoy a free ride at the expense of the taxpayers for the major portion of the campaign costs themselves.
>
> "Requiring a money payment alone, therefore, would be unconstitutional. ..."

E. Less Intrusive Means Are Clearly Available to Measure the "Seriousness" of a Candidate to Establish Eligibility for and the Level of Public Funding.

The Primary Matching Payment Act attempts to sort out "serious" from frivolous candidates by

eligibility criteria expressly solely in terms of dollars contributed in each state. As with attempts to sort out spurious candidates from "serious" ones with filing fees, however, such a wealth-related criteria is "extraordinarily ill-fitted to that goal" and infringes on constitutionally protected rights. Bullock v. Carter, supra, 405 U.S. 134, 146 (1972), Lubin v. Panish, supra, 415 U.S. 709, 717 (1974). Other means less injurious of these constitutionally protected rights are clearly available to accomplish such a goal. As this Court noted in Lubin v. Panish, supra, at page 718: "there are obvious and well-known means of testing the 'seriousness' of a candidacy," such as a petition requirement. The selection of the more drastic over the less drastic means is in clear violation of this Court's holding in Dunn v. Blumstein, supra, 405 U.S. 330 (1972), at page 343, that compelling state interests may not be pursued by:

> "... means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,' NAACP v. Button, 371 U.S. 415, 438 (1963); United States v. Robel, 389 U.S. 258, 265 (1967), and must be 'tailored' to serve their legitimate objectives. Shapiro v. Thompson, supra, at 631. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.' Shelton v. Tucker, 364 U.S. 479, 488 (1960)."

Furthermore, the matching system established by the Primary Matching Payment Act cannot be sustained, as asserted by the Court of Appeals in

the opinion below, at pa[illegible] 1566 (West's advance sheets) merely because Congress has also utilized a matching system in various programs of economic aid to states and localities for anti-pollution or highway programs. As stated by the Ninth Circuit Court of Appeals in United States v. Thoresen, 428 F.2d 654 (C.A. Cal. 1970) (citations omitted):

> "When legislative classifications threaten basic civil rights, the Equal Protection Clause requires 'some overriding statutory purpose,' and the lines drawn in such statutes are subject to 'the most rigid scrutiny.' ...
>
> "On the other hand, '[i]n applying the Equal Protection Clause to social and economic legislation, we give great latitude to the legislature in making classifications.' ..."

Clearly, then, the Primary Matching Payment Act can no more be held constitutional because of the highway program analogy than the poll tax could be sustained by the asserted analogy with driver's license fees in Harper v. Virginia Board of Elections, supra, 383 U.S. 663, 668 (1966).

II.

THE FEDERAL ELECTION CAMPAIGN ACTS OF 1971 AND 1974 INVIDIOUSLY DISCRIMINATE AGAINST NEW PARTY AND MINOR PARTY NOMINEES AND THEIR SUPPORTERS IN VIOLATION OF THE FIRST AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

We concur most strongly in the dissenting

opinion in the Court of Appeals on this point by Circuit Judge Tamm joined in by Circuit Judge Wilkey. West's advance sheets at pages 1604-1607. Since Judge Tamm's dissent makes the basic legal points quite clearly, we shall add but a few supplementary considerations.

A. The Criteria for Advance Public Funding in the General Election, Based Solely on Four-Year-Old Data, Provides a Test Remarkably Ill-Fitted to the Claimed State Interest.

If the authority relied upon by the Court of Appeals in the opinion below at page 1513 (West's advance sheets) is accepted, Presidential candidates must spend at least 70% of their time in fund raising rather than in campaigning. For the government to relieve certain candidates of this burden by public funding is to provide them with an immense and obvious advantage over other candidates not so funded. The arguments in I.(A) and (B), above, with respect to the constitutional problems raised by discriminatory funding of certain candidates apply equally here and are incorporated by reference.

Under the Federal Election Campaign Act ("FECA"), eligibility for advance public funding and the level of such funding is solely dependent upon the percentage of the vote received by the party's presidential nominee four years earlier. There is no alternative method by which a new party nominee may prove her or his "seriousness." despite the fact that this Court has recognized that other "obvious and well-known means of testing the 'seriousness' of a candidacy," such as a petition requirement, could be employed. Lubin v. Panish, supra, 415 U.S. 709, 718 (1974). The possibility of post-election reimbursement for a new party nominee does not save the

system. The new party nominee will still have had to divert 70% of her or his energies away from campaigning to fund raising.

Judge Tamm's dissent cites how poorly the eligibility formula would have applied to the elections of 1968 and 1972. Even more impressive are the examples of 1912 and 1916. Given below are the presidential election results for the major candidates in these elections, as well as the results for 1908, which would have established the advance funding levels for 1912. The data is from Svend Petersen, A Statistical History of the American Presidential Elections (N.Y., Ungar Publishing Co., 1963):

Party and Year	Electoral Vote	Popular Vote	Percentage of Vote
Republican			
1908	321	7,679,114	51.57%
1912	8	3,485,831	23.15%
1916	254	8,548,935	46.12%
Democratic			
1908	162	6,410,665	43.05%
1912	435	6,301,254	41.85%
1916	277	9,131,511	49.26%
Progressive			
1908	(Party did not exist in 1908)		
1912	88	4,127,788	27.42%
1916	0	35,034	0.19%
Socialist			
1908	0	420,858	2.83%
1912	0	901,255	5.99%
1916	0	585,974	3.16%

Some points should be noted from this table. Theodore Roosevelt, quoted from at length in the opinion below at pages 1511-1512 as an early advocate of public campaign financing, ran as the candidate of the newly-formed Progressive Party in 1912. Roosevelt, even though he ran second in both the popular and electoral vote that year, would have been ineligible to receive any advance public funding, under the FECA criteria. Was Roosevelt not a serious candidate? Or are the criteria for advance funding drawn in such a way as to exclude some serious candidates? Obviously, the latter is the case. Furthermore, the tendency of FECA criteria to perpetuate existing established parties can easily be deduced. The Progressive Party largely disintegrated as an effective national organization prior to the 1916 elections, having a candidate on the ballot in only three or four states and receiving barely 35,000 votes (0.19% of the total). But, under the FECA, with the prospect of millions of dollars in advance funds coming for the party's 1916 nominee, to be funded as a major party candidate, the party would have been invigorated and many would have sought its nomination. Many people might even have deserted the Republican Party, whose nominee would have been funded in advance only as a minor party candidate under FECA in 1916, to join a party destined to receive greater funding. Such a senario is not just speculation, it is the deliberate intent of the act as expressed in Senate Report 93-689, issued February 21, 1974, to accompany the FECA bill for that year. Reprinted in United States Code, Congressional and Administrative News, 93rd Congress--2nd Session, 1974 Volume 3, Legislative History, this document states, at page 5544:

> "All but fringe candidates would have an incentive to seek a major party nomination, rather than run as a minor party candidate, so as to be eligible for

> the full level of public assistance in the general election. ..."

If the FECA system had been in effect in the 1840's, we would probably still have the Whig Party around today. There can be no doubt that the FECA will act, and is designed to act, to perpetually establish the presently prevailing political parties. In this respect, then, the FECA is similar to the Ohio Election Code provisions struck down by this Court in Williams v. Rhodes, supra, 393 U.S. 23 (1968).

B. There is a State Interest in Maintaining a Diverse Range of Choice in the Electoral Arena.

As this Court stated in Lubin v. Panish, supra, 415 U.S. 709 (1974), at page 716:

> "... It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues. ..."

A diversity and multiplicity of views contending in the political arena is vital to the health of a free society. As stated by the eminent Circuit Judge Learned Hand in a freedom of the press context in United States v. Associated Press, 52 F.Supp. 362 (S.D. N.Y., 1943), at page 372, the dissemination of news and views from many different sources, is:

> "... one of the most vital of all general interests ... [It] is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through

> any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."

Elections are not just the means by which we select our public officers, they are a vital forum for the discussion of public policy. Third parties and independent candidacies play an "important part" in this process as recognized in the comprehensive Harvard Law Review article, supra, "Developments in the Law--Elections," 88 HLR 1111, at page 1123:

> "... Frequently they raise issues and develop policies long before established parties are prepared to act, and their presence on the general election ballot and participation in election campaigns permits voters to demonstrate support for new or unorthodox ideas. Major party nominees may respond to popular support for other candidates by reformulating their policies and programs. Thus, despite a general lack of electoral success, minor parties and independent candidates may eventually see substantial portions of their programs implemented.
>
> "Minor parties and independent candidacies may also serve a legitimizing function, by providing disaffected voters with an outlet for their frustration with the established parties. Without this alternative, dissatisfied voters who find themselves repeatedly confronted with unattractive policies and candidates may come to doubt the legitimacy of the entire electoral process. It is therefore plain that the importance of independent and minor

> party candidates transcends their ability to capture electoral office." (Footnotes omitted.)

Thus, there is a state interest in maintaining an open electoral process so that the society can grow and consider new ideas. Legislators concerned about re-election may be slow to see it, but it is there nonetheless.

Considering how often the claimed state interests in regulating access to the electoral process are stated, and, as noted in the Harvard Law Review article cited above at page 1137, perhaps sometimes overstated, it would be a positive step for this Court to reassert the state interest in maintaining a diverse range of choice in the electoral arena. This case, involving legislation highly discriminatory to independent candidates and minor parties, might provide a good vehicle for just such a statement.

III.

THE PIRACY OF THE RESTRICTED ACCOUNT FUNDS BY SECTION 6(d) OF P.L. 93-53 CASTS A DOUBT ON THE "VOLUNTARYNESS" OF MILLIONS OF DOLLARS PRESENTLY IN THE PRESIDENTIAL ELECTION CAMPAIGN FUND.

In the first year of its operation under the FECA of 1971, the presidential $1.00 check-off on the federal income tax return established by 26 U.S.C. 6096 and 9006 permitted a taxpayer to designate her or his $1.00 to go to a general fund for the use of all party candidates or to a "separate account" for the sole use of the presidential nominee of whatever party the taxpayer designated. If any money in a separate account remained unused by the

party nominee after the election, it would revert to the "general fund of the Treasury," as 26 U.S.C. 9006(b) then required, but under no circumstances could it be used to benefit the candidates of any other party.

With this understanding, millions of American taxpayers checked off their dollars for designated "separate accounts." in early 1973.

By a rider to the Public Debt Limitation Bill of 1973, P.L. 93-53, however, the "separate accounts" were abolished and the moneys therein transferred to the general fund for the use of all party nominees. Section 6(d) of the bill stated that:

> "... Any designation made [heretofore] ... for the account of candidates of any specified political party shall ... be treated solely as a designation to the Presidential Election Campaign Fund."

Consent was not asked of the individual taxpayers to this change. Furthermore, if a taxpayer objected to the change and wanted to withdraw her or his check-off, the taxpayer found that it was not possible to do so.

The Court of Appeals, in the opinion below at pages 1507 and 1562, stated that:

> "... If the taxpayer wants to avoid any conception that some part of 'his' tax money will benefit candidates he does not favor, then he can simply refrain from checking off his dollar for the Fund."

This statement leaves an erroneous impression that all the money presently in the fund has been voluntarily collected.

Basically, the check-off device is nothing but window dressing, "a bookkeeping manipulation with no practical impact," in the words of the Harvard Law Review, supra, 88 HLR 1111, 1266, note 176, designed to give people the semblance of participation and control without the substance.

CONCLUSION

The judgment of the Court of Appeals on certified questions 5 and 6 should be reversed.

Respectfully submitted,

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